Supreme Court, U.S.
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IN THE

Supreme Court

of the

United States

OCTOBER TERM, 1997

CALVIN L. SHOEMAKER,
Plaintiff-Petitioner,

v.

UNITED STATES, SIX UNKNOWN FEDERAL DOES, UNITED STATES JUSTICE DEPARTMENT, CENTRAL INTELLIGENCE AGENCY, UNITED STATES SECRET SERVICE, DEPARTMENT OF DEFENSE, VETERANS ADMINISTRATION, NATIONAL SECURITY AGENCY; DOES 1-20;
Defendants-Respondants.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Calvin L. Shoemaker, *Plaintiff, pro se*
342 West 71st St., #3S8
New York, NY 10023
917.912.4868

72 pp

QUESTIONS

1. **Has the court of appeals for the Second Circuit far departed from the accepted and usual course of judicial proceedings pertaining to the applicable standards of review on appeal, thus resulting in a constitutional deprivation of the right to trial by jury, as to call for an exercise of the Court's supervisory power to rule that affirmation of dismissal on appeal by improperly applying the standards of review is unconstitutional?**

2. **Does the Federal Tort Claims Act apply to a federal action: (a) which is brought for a violation of the Constitution of the United States; or (b) which is brought for a violation of a statute of the U. S. under which such action against an individual is otherwise authorized, citing the "Exclusiveness of remedy" statute, Title 28 U.S.C.A. §2679?**

3. **Is the United States Supreme Court losing power because the federal courts ignore the repeated assertions of the Court that pro se plaintiffs only need to plead in simple form?**

4. **Is it constitutional if a defendant and/or attorney tricks a district court into falsely believing that no discovery information exists pursuant to Fed. R. Civ. P. Rules 26 and 33, whether inadvertently or with scienter, so that the district court dismisses a complaint unfairly?**

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States court of appeals appears at the Appendix to the petition and is not published.

The opinion of the United States district court appears at the Appendix to the petition and is not published.

JURISDICTION

The date that the United States Court of Appeals for the Second Circuit decided the case was February 5, 1998. A petition for rehearing was not filed by the Plaintiff. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS, FEDERAL AND CIVIL RULES, PENAL CODE

(complete in Appendix)

The First Amendment
The Fourth Amendment
The Fifth Amendment
The Eighth Amendment
The Ninth Amendment
The Fourteenth Amendment

42 U.S.C.A. § 1983
42 U.S.C.A. § 1985(3)
28 U.S.C.A. § 2671-§ 2679
Fed. R. Civ. P. Rule 4
Fed. R. Civ. P. Rules 8(a), (e)(1)
Fed. R. Civ. P. Rule 12
Fed. R. Civ. P. Rule 26
Fed. R. Civ. P. Rules 55(a), (b)(1), (c)
Local Rule 3(g)

STATEMENT OF CASE

The Complaint, No. 96-cv-1465 was filed by the *pro se* Plaintiff in the United States District Court for the Southern District of New York on February 29, 1996. An Amended Complaint accepted by the court on September 25, 1997.

The Plaintiff claimed that the listed Defendants stalked him, harassed him, eavesdropped, invaded his privacy, used electronic devices to gather information about his life, publicly broadcast personal and private information gathered from the use of the eavesdropping of electronic devices, engaged in a conspiracy to defame him, violated his rights, and caused mental anguish and emotional distress.

Plaintiff sued pursuant to: *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388; Title 28 U.S.C.A. §1346(b); and Title 28 U.S.C.A. §§ 2671 et seq., and for violations of his First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendment Rights under the Constitution.

A. The Administrative Claim Process

The Respondent believes that he has presented a tort claim against the Respondents. The Petitioner wrote several tort claims against the U.S. pursuant to the Federal Tort Claims Act (the "FTCA") 28 U.S.C.A. §2671 et seq. that went unanswered for a period of 6 months, thus establishing jurisdiction pursuant to 28 U.S.C.A. §2675.

In fact, the Respondent the VA freely admits that the Petitioner has presented a valid tort claim. Petitioner's letters to the Respondents were not referenced as accusations, correspondence or letters. The claims reached the threshold of qualifying as tort claims. Here, it should be without question that the district court has jurisdiction by virtue of the admission "that the [P]laintiff had filed an administrative tort claim" yet indicative of Respondent's inability to solve, settle or otherwise compromise the entire matter within six months.

B. The District Court Proceedings

The Complaint (A-3 to A-14) consists of 43 claims, some applying to the FTCA, and some that don't. Specifically, the Petitioner's dismissed Complaint was brought for violations of the Constitution.

A conference was held the 25th of September, 1996, the third amended Complaint was accepted and discovery commenced pursuant to a motion by the Petitioner pursuant to Fed. R. Civ. P. Rule 33.

The Petitioner, after studying the rules of the district court judge and noting that the Respondents had reached a certain timeline and had not given advance notice of two days, among other judge requirements, to the district court judge nor Petitioner, took steps to file defaults against the Respondents and filed those defaults on the expiration date, specifically, only to receive a letter from the Respondents shortly thereafter. But the Clerk of the Court had certified the defaults with seal.

Moreover, the U.S. Attorney merely sought an extension of time specifically for the Respondent the VA. The U.S. Attorney gave good cause for extending time to the VA only. The U.S. Attorney provided no good cause for extending time to the remaining Respondents and the U.S. Attorney waited until the day of the deadline to seek an extension of time, leaving the U.S. Attorney no time to answer the Complaint had the judge denied the extension because of her rules.

The U.S. Attorney argued that the request by the Government for extension of time included all Respondents with reference to a confirmed administrative tort claim.

Again, nevertheless, we know that we have an admission to the letters from the Petitioner as a concession to an administrative tort claim that, if not settled within six months, establishes jurisdiction in district court pursuant to 28 U.S.C.A. §2675.

Discovery was sought by Petitioner pursuant to Fed. R. Civ. P. Rule 33 to a certain degree and granted by the court in great part.

The court, showing leniency toward the Respondents and weighing the likelihood of success by the Petitioner against the burdens on the Respondents among other factors, ordered discovery

within her discretion but allowed no requests for admission, interrogatories or depositions at that stage. The Petitioner subsequently waited for information, yet Respondents produced nothing but superfluous declarations despite court orders.

The judge dismissed the action because Respondents fraudulently represented to the court, with scienter, that information sought through discovery orders did not exist, deluged the court with irrelevant declarations of nonexistent administrative tort claims, and thereafter claimed sovereign immunity thereby.

The Petitioner, simultaneously with the court proceedings, had initiated requests under the Privacy Act and Freedom of Information Act (the "FOIA"), and subsequently produced several documents, some of which were discovered utilizing the FOIA and some from certificates on hand yet all documents that should have been produced during discovery, that clearly indicated that Respondents fraudulently represented to the court that no discovery documents existed.

The district court judge, overwhelmed already with the sheer quantity of other cases before the courts, erred by misjudging the situation and did not accept the defaults, erred by misjudging Federal Rules of Civil Procedure Rule 55, and erred by misinterpretation applicable statutes, rules, case law and Supreme Court rulings.

Finally, the Petitioner expresses overwhelming arguments that present a convincing appeal before the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari should be granted for several reasons:

I. The court of appeals for the Second Circuit has far departed from the accepted and usual course of judicial proceedings pertaining to the applicable standards of review on appeal, thus resulting in a constitutional deprivation of the right to trial by jury, as to call for an exercise of the Court's supervisory power to rule that affirmation of dismissal on appeal by improperly applying the standards of review is unconstitutional. Specifically, three separate standards of review are typically utilized by the appellate courts to determine whether or not error and/or abuse of discretion is committed in district court decisions that erroneously dismiss complaints:

A. Where appellate courts must determine mixed issues of fact and law, the standard of review shall be de novo. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948). (Unless the factual issues predominate. *Miller v. Fenton*, 474 U.S. 104 (1985).)

B. With respect to the factual elements and the clear error standard, an admitted administrative tort claim with a demand for sum certain pursuant to the Federal Tort Claims Act establishes jurisdiction in federal district court pursuant to Title 28 U.S.C.A. §2671 et seq., and thus precludes dismissal for failure to state a claim pursuant to Rule 12(b)(6).

C. With respect to the abuse of discretion standard routinely applied to district court rulings on evidence and discovery, a defendant's failure to comply with appropriate court-ordered discovery, in other words scienter with intent to deceive, manipulate and defraud the courts with respect to discovery, would invalidate a dismissal.

II. The Federal Tort Claims Act does not apply to a federal action: (a) which is brought for a violation of the Constitution of the United States; or (b) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized, citing the Exclusiveness of Remedy statute, Title 28 U.S.C.A. §2679.

III. The United States Supreme Court is losing power because the federal courts are ignoring the repeated assertions of the Court that pro se plaintiffs only need to plead in simple form.

One of the unique characteristics of the American judicial system is the fairness attributed to our legal structure. The United States Supreme Court had this in mind when it realized that pro se plaintiffs were generally incapable of producing a complaint with the complex pleading structure that we see in the courts today. Notwithstanding these complexities, the Court was tasked to interpret the Federal Rules of Civil Procedure, and in *Leatherman v. Tarrant County Etc.*, 113 S.Ct. 116 (1993), 122 L.Ed 2d 517, 520-521, the Court discusses Rule 8:

> "Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' In *Conley v. Gibson*, 355 U.S. 41 (1957)," the Court "said in effect that the Rule meant what it said: [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

Further, the Court held that a "federal court may not apply a 'heightened pleading standard' more stringent than the usual

pleading requirements of Rule 8(a) in civil rights cases alleging municipal liability under §1983. . . ." Id. at 521.

The Court ruled that a complaint not filed in forma pauperis is not subject to a dismissal as frivolous under Rule 12(b)(6) in *Neitzke v. Williams*, 490 U.S. 319 (1989) at 328:

> "[Q]uestions of federal law, including claims filed pursuant to 42 U.S.C.A. §1983, have on a number of occasions arisen on motions to dismiss for failure to state a claim, and have been substantial enough to warrant this Court's granting of review, under its certiorari jurisdiction, to resolve them. See, *e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976); *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968)" . . . "To term these claims frivolous is to distort measurably the meaning of frivolous both in common and legal parlance."

The Court further ruled in *Haines v. Kerner*, 404 U.S. 519 (1971), that claims produced by a pro se plaintiff should be held "to less stringent standards than formal pleadings drafted by lawyers."

Moreover, the Court ruled in *Neitzke*, *supra*, at 327, that what "Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." The Court is bound to accept without question the truth of the plaintiff's allegations. Additionally, see *Cooper v. Pate*, 378 U.S. 546 (1964); *Estelle v. Gamble*, 429 U.S. at 99.

Next, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984) at 73, the Court ruled that a complaint should be dismissed only where it appears that the pleader would not be entitled to relief under any set of facts that could be proven consistent with the allegations.

Further, the Court ruled in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" and that complaint need only "give the defendant fair

notice of what the plaintiff's claim is and the grounds upon which it rests."

A dismissal of a pro se complaint with wanton disregard by the lower courts to these Supreme Court rulings has a negative impact on all Americans, is a slap in the face to this Court and threatens the fairness and integrity of our judicial system.

IV. **It is unconstitutional if a defendant and/or attorney tricks a district court into falsely believing that no discovery information exists pursuant to Fed. R. Civ. P. Rules 26 and 33, whether inadvertently or with scienter, so that the district court dismisses a complaint unfairly.**

What could be more unjust and more unconstitutional?

CONCLUSION

The Petition for Writ of Certiorari should be granted.

With Admiration & High Honor,

Dated: New York, NY



Calvin L. Shoemaker, Petitioner, *pro se*
342 W 71st St., #3S8
New York, NY 10023
917.912.4868

APPENDIX

DC: SDNY
DC Docket: 96-cv-1465
DC Judge: SCHEINDLIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the eighth day of March February [sic], one thousand nine hundred ninety-eight.

Present: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE GUIDO CALABRESI,
Circuit Judges,
HONORABLE RICHARD OWEN,
District Judge.

CALVIN L. SHOEMAKER
Plaintiff-Appellant,

-v- No. 9706073

U.S. DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION; DRUG ENFORCEMENT AGENCY; PRESIDENT OF THE UNITED STATES OF AMERICA; VICE PRESIDENT OF THE UNITED STATES; NATIONAL SECURITY AGENCY; SIX UNKNOWN FEDERAL DOES,

Defendants-Appellees.

FOR APPELLANT: Calvin Shoemaker, Pro Se, New York, NY

FOR APPELLEES: Kathleen M. Riedy, Steven M. Haber, Assistant United States Attorneys, New York, NY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
CALVIN SHOEMAKER,
Plaintiff,
- against -

MEMORANDUM OPINION
AND ORDER

UNITED STATES OF AMERICA, 96 Civ. 1465 (SAS)
et al.,
Defendants.x

SHIRA A. SCHEINDLIN, U.S.D.J.

Defendants United States, Six Unknown United States Federal Does, Central Intelligence Agency, United States Secret Service, Department of Defense, Unknown Military Personnel, Veterans Administration, Unknown Veterans Administration Personnel, Unknown United States Congressmen, Unknown Pentagon Employees, Carl Mayer, William Perry, Al Gore, Barry McCaffrey, Anthony Lake, National Security Agency, Louis Freeh, Janet Reno and Newt Gingrich ("defendants") move to dismiss the third amended complaint pursuant

[1]

to Fed. R. Civ. P. 12(B)(1), Fed. R. Civ. P. 12(b)(5), 42 U.S.C. § 1985, and 42 U.S.C. § 1961.[1] Plaintiff moves to amend the complaint for the fourth time pursuant to Fed. R. Civ. P. 15. For the reasons set forth below, defendants' motion is granted, and plaintiff's motion is denied.

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[1] Although Unknown Medical Personnel, Unknown Foreign Countries, Ted Turner, TBS, Time Warner, Inc., Raymond Kelly, Dorson Liss, Oliver North and Lawrence Tisch were named as defendants in the complaint, there is no evidence that service was ever effected upon them. Therefore, to the extent that plaintiff interposes claims against them, those claims are dismissed, pursuant to Fed. R. Civ. P. 49m).

I. BACKGROUND

Plaintiff Calvin L. Shoemaker filed this *pro se* action on February 29, 1996, naming as defendants the Department of Justice ("DOJ"), the Federal Bureau of Investigation ("FBI") and the Drug Enforcement Administration ("DEA"). This complaint contained various constitutional and tort claims, some of which had already been dismissed in an earlier action filed by plaintiff in this court.[2] In essence, plaintiff alleged the existence of a conspiracy to gather information about him through the use of electronic surveillance devices located in his home, and that such conspiracy caused him to suffer motional distress. Although some of his claims indicated the dates and times of such purported wrong-doing [sic], there was an overall failure to state facts in support

[2]

of such allegations.[3] He filed his first verified amended complaint on April 9, 1996, in which he added the President, the Vice President, and the National Security Agency ("NSA") as defendants in the action. By this amendment, plaintiff also removed the specific examples of the conduct involving the broadcast of television commercials, and interposed a multitude of vague and conclusory allegations in their stead. With leave of court, plaintiff filed his second amended complaint on June 18, 1996. By this amendment, plaintiff replaced the previously named defendants with "Six Unknown Federal

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[2] Claims II - IX are similar to claims interposed in Shoemaker v. State of California, 95 Civ. 2945 (LAP).

[3] This deficiency recurs throughout all of plaintiff's subsequent pleadings.

Does", and increased the amount of money damages.[4]

On September 25, 1996, a pre-trial conference was held, during which plaintiff requested and was granted leave to amend his complaint yet again. See Pre-trial Conference Transcript dated Sept. 25, 1996, at 4. At that time, defendants' motion to dismiss the second amended complaint was pending. Plaintiff represented to the Court not only that the third amended complaint would be his last pleading, but that he would not interpose additional claims thereafter. Based on those representations, the Court granted plaintiff leave to amend the complaint again. On September 30, 1996, plaintiff filed the third amended complaint, suing

[3]

various governmental agencies and Bivens defendants,[5] and seeking both injunctive relief as well as $99,000,000 in damages from each defendant. In this 43-paragraph complaint, plaintiff asserts various constitutional and tort claims against the United States, including eavesdropping into his private residence, computer trespassing into his personal computer system, invasions of his bodily integrity, and telephone taps. Plaintiff alleges violations of his First, Fourth, fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and interposes claims under the Racketeer Influenced and Corrupt

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[4] In both the original complaint and the first amended verified complaint, plaintiff sought $850,000,000. In the second amended complaint, plaintiff sought $869,000,00 plus costs.

[5] The Bivens defendants are Carl Mayer, William Perry, Leon Panetta, Barry McCaffrey, Anthony Lake, National Security Agency, Louis Freeh, Janet Reno, Al Gore and Newt Gingrich.

Organizations Act[6], the New York Penal Law[7], the New York Public Health Law[8], and the New York Civil Practice Law and Rules[9].

Plaintiff has filed a previous *pro se* action in the Southern District of New York on April 26, 1995 before Judge Loretta Preska.[10] In that action, he named several defendants,[11] some

[4]

of which are named in this action,[12] and alleged defamation and civil rights violations. Citing the frivolity of the various claims,[13] Judge Preska adopted the

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6 18 U.S.C. 1961 et seq.

7 N.Y.P.L. §§ 250.05, 155.42, 155.05.

8 N.Y. Pub. Health Law § 2805-d [sic]

9 N.Y.C.P.L.R. § 4504.

10 Shoemaker v. State of California, 95 Civ. 2945 (LAP).

11 These defendants are the State of California, State of New York, CBS, Inc. ("CNN"), and National Broadcasting Company, Inc. ("NBC").

12 These defendants are CBS, NBC, ABC and CNN.

13 These are some examples: (1) "[A]fter Plaintiff used the toilet, ... ABC, Inc. broadcast a Capzasin P commercial and a Maalox commercial indicating to the public that the toilet was being monitored, Plaintiff's urine was judged as "sin", and that Plaintiff is 'locked' in some manner." (2) "[A]fter Plaintiff was awakened abruptly by a knock at the door and Plaintiff subsequently roared/yawned loudly, ... CNN, Inc. broad-cast [sic] a 6 Flags commercial indicating to the pubic that the Plaintiff is mentally sick in some manner." (3) "[A]fter Plaintiff cursed those individuals eavesdropping on him while in his residence, ... ABC, Inc. broadcast a Chrysler Le Baron commercial indicating that Plaintiff made a verbal slur and was subsequently barred in some manner." (4) "[A]fter Plaintiff cursed those individuals eavesdropping on him while in his residence, ... during NBC, Inc.'s broadcast of the show Extra, the hostess of the show aid 'it's what everyone wanted to hear', indicating police SWAT was eavesdropping on the Plaintiff."

report and recommendation of the magistrate judge and dismissed the action *sua sponte*.

In the instant action, defendants have moved to dismiss the third amended complaint, and advance six arguments in support of their motion. The arguments are: insufficiency of service of process on the Bivens defendants; sovereign immunity bars plaintiff's claims against the United states; lack of subject matter jurisdiction; failure to state a claim against the Bivens defendants; failure to state a claim upon which relief may be granted, pursuant to Fed. R. Civ. P. 12(b)(6) and res judicata, based on the prior action litigated before Judge Preska. In

[5]

response to that motion, plaintiff has moved for leave to file a proposed fourth amended complaint, in which he drops six defendants and names nine additional defendants,[14] interposes nine additional claims,[15] and seeks $199,000,000 in damages from each defendant.

II. DISCUSSION

A. The Motion to Amend

1. Legal Standard

Pursuant to Fed. R. Civ. P. 15 (a) leave to amend a complaint is usually freely given. However, the court may exercise its

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[14] Plaintiff dropped defendants Ted Turner, TBS, Time Warner, Lawrence Tisch, Dorson Liss, and Oliver North. Plaintiff added defendants CNN, CBS, ABC, NBC, Time Warner Cable, Inc, National Aeronautics And Space Administration ("NASA"), NYC, New York City Police Department ("NYPD"), and DEA.

[15] In claims II - X, plaintiff alleges computer trespassing and unlawful activity relating to his computer material in violation of various provisions of the New York Penal Law.

discretion to deny leave in a number of circumstances. For example, leave may be denied where there is evidence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed" or where the amendment would cause "undue prejudice to the opposing party." Rachman Bag Co. v. Liberty Mutual Insurance Co., 46 F.3d 230, 234 (2d Cir. 1995)(quoting Foman v. Davis, 371 U.S. 178, 182 (1962)).

[6]

Prior to granting leave to amend, a court must examine the proposed claims to determine if they are futile on their face. See Town of New Windsor v. Tesa Truck, Inc., 919 F.Supp. 662, 678 (S.D.N.Y. 1996) ; Barrett v. United States Banknote Corp., 806 F.Supp. 1094, 1098 (S.D.N.Y. 1992) if those claims would be futile, leave to amend should not be granted. See Foman v. Davis, 371 U.S. 178, 182 (1962). An amendment is considered futile if the amended pleading fails to state a claim or would be subject to a successful motion to dismiss on some other basis. See, e.g., S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 42 (2d Cir. 1979); Chan v. Reno, 916 F.Supp. 1289, 1302 (S.D.N.Y. 1996).

2. Sovereign Immunity

As a threshold matter, defendants argue that the doctrine of sovereign immunity would bar plaintiff's claims against NASA and the DEA. Claims asserted against United States agencies, or officers of the United States acting in their official capacities, are considered to be asserted against the United States. See Dugan v. Rank, 372 U.S. 609, 620 (1963). Under the doctrine of sovereign immunity, the United States enjoys immunity from suit

except in those instances in which it has expressly consented to be sued. A waiver of this immunity may never be implied from the factual circumstances of the particular case. Rather, the waiver must be unequivocally expressed in each instance. See United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992); United States v. Michell, 445 U.S. 535, 538 (1980). Plaintiff has failed to advance

[7]

any basis for concluding that NASA and the DEA have made the requisite waiver of governmental immunity with respect to those claims. Moreover, even by a liberal reading of the complaint, there are two ways in which the United States may be deemed to have waived its immunity - the Federal Tort Claims Act, 28 U.S.C. 1436(a), 2671 et seq. (the "FTCA") and the Tucker Act, 28 U.S.C. 1346(a)(2).

Although the FTCA provides a limited waiver of sovereign immunity with respect to negligent or wrongful acts of federal employees, see McNeil v. United States, 508 U.S. 106, 111-13 (1993), it is inapplicable to the present case. Application of the statute is not triggered in the absence of an allegation that an administrative claim has been presented in accordance with 28 U.S.C. 2675.[16] Because the FTCA waives

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[16] Section 2675 provides in relevant part, that:

> [A]n action shall not be instituted upon a claim against the United States for money damages for injury ... caused by the negligent or wrongful act or omission of any employee, of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

required to be filed in order to begin the administrative review must be strictly construed. See Keene Corp. v. United States, 700 F.2d 836, 841 (2d Cir. 1983); Byrne v. United States, 804 F.Supp. 577, 579 (S.D.N.Y. 1992). Plaintiff has the

[8]

the burden to establish that he has filed such a claim. DiLorenzo v. United States, 496 F.Supp. 79, 84 (S.D.N.Y. 1980). In order to discharge this burden, plaintiff must allege in the complaint circumstances indicating the presentation of the administrative claim to, and final disposition of the claim by, the appropriate federal agency In re Agent Orange Product Liability Litigation, 818 F.2d 210, 214 (2d Cir. 1987); Altman v. Connally, 456 F.2d 1114, 1116 (2d Cir. 1972). The claim presented to the agency must provide "sufficient information both to permit an investigation and to estimate the claim's worth." Keene Corp. v. United States, 700 F.2d at 842. Because plaintiff fails to allege anywhere in the proposed amended pleading that he has complied with the FTCA's administrative claim requirement, this Court would lack subject matter jurisdiction over any common law tort claims that plaintiff might have Against DEA and NASA. Moreover, defendants have submitted a declaration from DEA stating that, after a thorough search of the agency's records, there is no evidence of an administrative tort claim filed by plaintiff. See Declaration of Ellen Harrison ("Harrison Decl."), Associate Chief Counsel, Civil Litigation Section of DEA, dated Sept. 3, 1996.

The Tucker Act also waives sovereign immunity in the appropriate case. It provides that the district courts shall have

original jurisdiction over actions against the United States, "not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress." 28 U.S.C. § 1346(a)(2). The Tucker Act

[9]

would not waive sovereign immunity in this case because Plaintiff seeks money damages in the amount of $99,000,000 against each of the defendants.

3. Res Judicata

Defendants point out that the doctrine of res judicata would bar plaintiff's claims against NYC, CNN, CBS, 'NBC and ABC were plaintiff permitted to amend the complaint. It is well settled that a prior adjudication on the merits by a court of competent jurisdiction precludes the same "parties or their privies from litigating issues that were or could have been raised in th[e] [prior] action." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ; Woods v. Dunlop Tire Corp., 972 F.2d 36, 38 (2d Cir. 1992). Res judicata operates "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate, protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. 147, 153-54 (1979). In order to determine whether the causes of action are the same for the purposes of res judicata, the "crucial element ... is the factual predicate of the several claims asserted." Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir. 1977). Further, when the factual predicates on which the claims

are based are substantially identical, the claims are duplicative for the purposes of res judicata. See Berlitz Schools

[10]

of Languages of America, Inc v. Everest House, 619 F.2d 211, 215 (2d Cir. 1980). Plaintiff's new claims X - XVIII are virtually identical to the claims asserted against NYC, CNN, CBS, NBC and ABC in the earlier action[17], which allegations Judge Preska characterized as "delusional" and "patently frivolous" upon dismissing them.

4. Rule 12(b)(6)

Defendants maintain that plaintiff would fail to present a claim upon which relief may be granted were he permitted to amend his complaint. It is firmly established that, where a pro *se* litigant brings a civil rights action, he should be "afforded every reasonable opportunity to demonstrate that he has a valid claim.". Satchell v. Dilworths, 745 F.2d 781, 785 (2d Cir. 1984); see Ruderman v. New York City Police Department, 857 F.Supp. 326, 331 (S.D.N.Y. 1994). Although the standard against which the sufficiency of a pro *se* litigant's pleadings is measured is less stringent than that applicable to pleadings prepared by an attorney, see Haines v. Kerner, 404 U.S. 519, 520 (1972), the pleadings must nevertheless provide to the defendants both "fair notice" of the basis for the claim, and the facts upon which the claim rests. Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988);

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[17] These claims contain allegations of a conspiracy involving the use by the defendants of electronic devices within the Plaintiff's home to gather information about the Plaintiff for the purpose of publishing the information with malicious intention.

[11]

Chodos v. FBI, 559 F.Supp. 69, 71 (S.D.N.Y.), aff'd without opinion, 697 F.2d 289 (2d Cir. 1982). If a pleading fails to furnish such fair notice and factual basis, the pro se plaintiff has failed to state a claim. Furthermore, the Second Circuit "has repeatedly held that complaints containing only 'conclusory, vague', or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed. Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Ostrer v. Aronwald, 567 F.2d 551, 556 (2d Cir. 1977) ; accord Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir. 1983) . When this happens, the court may dismiss the complaint. See Salahuddin v. Cuomo, 861 F.2d at 42; Sommer v. Dixon, 709 F.2d at 175; Jones v. Capital Cities/ABC, Inc., 874 F.Supp. 626, 628 (S.D.N.Y. 1995).

Plaintiff's proposed fourth amended complaint is a laundry list of wrongful acts allegedly committed by the defendants.[18] See The Proposed Fourth Amended Complaint. For example, Plaintiff alleges that defendants collected samples of his feces, without his consent, and then publicly ridiculed him by broadcasting their analysis of the feces on national television.[19]

[12]

The complaint is fatally defective because it lacks the requisite specificity. Not only does plaintiff consistently refer to the "aforementioned" defendants without

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[18] The remaining defendants that plaintiff proposes to add to the Fourth Amended Complaint are NYPD and Time Warner Cable, Inc. All of the other defendants are named in the Third Amended Complaint, and are discussed below in connection with the motion to dismiss that complaint. 19 XLI and XLII.

[19] XLI and XLII.

any particularization,[20] but he also neglects to allege the dates of the alleged wrongdoing.[21] In addition, the complaint fails to describe the nature of the intellectual property allegedly appropriated or the type of computer material allegedly taken, distributed or duplicated by the defendants. See id., claims II - IX. This complete absence of particularity renders the complaint incapable of withstanding a motion to dismiss, to the extent that it fails to provide defendants with fair notice of, or the factual basis for, its claims. Because plaintiff's Proposed Fourth Amended Complaint would be subject to dismissal under Fed. R. Civ. P. 12(b) (6), -the motion for leave to amend is denied.

B. Motion to Dismiss the Third Amended Complaint

1. Rule 12(b)(1)

The Supreme Court has repeatedly held that "the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit[.]'" Hagans v. Lavine, 415 U.S. 528, 536-37 (1974) (quoting Newburyport Water Co. v. Newburyport, 193

[13]

U.S. 561, 579 (1904)) Here, the claims asserted do not provide any facts related to specific events that would substantiate

[20] II, III, IV, VII, VIII and X. Plaintiff refers to "the Defendants" in V, VI and IX.

[21] In claims II, III and IV, plaintiff refers to periods of time spanning 10 months in 1996. In claims V, VI, VII, VIII, IX and X, the plaintiff fails to provide any dates at all.

plaintiff's allegations. This defect renders the complaint "patently insubstantial" and therefore dismissable for "want of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." Neitzke et al. v. Williams, 490 U.S. 119, 327 n.6 (1989).

2. Rule 12(b)(5)

Fed. R. Civ. P. 12(b)(5) permits a pleader to assert by motion a defense of insufficiency of service of process. Defendants argue that, as a threshold matter, the complaint is dismissable, pursuant to Fed. R. Civ. P. 12(b) (5), because of insufficient service of process against the Bivens defendants.[22] Fed. R. Civ. P. 4(d) permits a plaintiff to request that the defendant waive service of process, so long as certain procedures detailed in Rule 4 are followed. The record does not contain any basis for concluding that any of the Bivens defendants were asked, in conformity with Rule 4, to waive service of process. In the event that service is not waived, then Fed. R. Civ. P. 4 requires either that personal service be effected upon the Bivens defendants, or that service be effected pursuant to state law. Because no evidence exists to suggest that service was effected in

[14]

accordance with either of these two methods,[23] the court lacks

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[22] See footnote 5, supra, for a list of these defendants.

[23] Even if the Bivens defendants had been properly served, no claim would lie against those defendants because under Bivens, liability may attach to a federal official only where that official personally violated a well-established constitutional right of which a reasonable person would have known. Harlow v.

jurisdiction over the Bivens defendants. See generally Griffith v. Nixon, 518 F.2d 1195, 1196 (2d Cir. 1975) (per curiam).

3. Sovereign Immunity

For the same reasons stated in Part I.B., plaintiff's claims against the federal government defendants in the Third Amended Complaint are barred by sovereign immunity. Defendants have submitted numerous declarations by various agency personnel describing diligent searches of each of the defendant agencies' records. These searches have uncovered no notice of claim. The record shows that plaintiff did not present a tort claim to VA, CIA, Secret Service, Department of Defense, nor NSA. See Declaration of Patricia Batt ("Batt Decl."), an attorney in the Office of the General Counsel of CIA, dated Nov. 6, 1996; Declaration of Richard J. Griffin ("Griffin Decl. Deputy Director of Secret Service, dated Nov. 5, 1996; Declaration of Joseph H. Rouse ("Rouse Decl."), Chief and Deputy Chief of Tort Claims Division of Army, dated

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(23 cont'd) Fitzgerald, 457 U.S 800, 818-(1982); see also Butz v. Economou, 438 U.S. 478, 506-07 (1978). Moreover, there is a special standard applicable to claims asserted against Bivens defendants. In order to state such a claim, the plaintiff must allege that each Bivens defendant both committed a specific wrongful act, and was directly and personally responsible for the conduct underlying the complaint. See Barbera v. Smith, 836 F.2d 96, 99 (2d Cir. 1987); Washington Square Post #1212 American Legion v. New York, 720 F.Supp. 337, 347 (S.D.N.Y. 1989), rev'd on other grounds, 907 F.2d 1288 (2d Cir. 1990); Lee v. Carlson, 645 F.Supp. 1430, 1436 (S.D.N.Y. 1986). Because the complaint fails to allege either that any of the Bivens defendants personally committed a specific wrongful act, or were directly and personally responsible for any of the conduct underlying the complaint, the allegations against the Bivens defendants must be dismissed.

Nov. 5, 1996; Declaration of Carla S. Walgenbach ("Walgenbach Decl."), Lieutenant Colonel, Acting Chief, Tort Claims and Litigation Division, Air Force Legal Services Agency of USAF, dated Nov. 6, 1996; Declaration of Lisa Settle ("Settle Decl."), an attorney in the Office of Regional Counsel of VA, dated Nov. 5, 1996; Declaration of Stephanie Bonnefond ("Bonnefond Decl."), a paralegal in the General Counsel's Office of NSA, dated Aug. 29, 1996; Declaration of Veronica L. Massie ("Massie Decl."), a paralegal specialist at DOJ, dated Nov. 6, 1996; Declaration of G.C. Paad ("Paad Decl. Commander, Judge Advocate General's Corps, United-States Navy, Deputy Assistant Judge Advocate General (Claims and Tort Litigation Division), Office of the Judge Advocate General, Department of the Navy, dated Nov. 7, 1996. In addition, plaintiff's attempts to present a tort claim to DOJ and VA were unavailing because his letters to them failed to set forth any facts that would "permit an investigation" into the purported wrong-doing. See Massie Decl. at 1 10; Settle Decl. at 1 5, 6.a See Cook v. United States, 978 F.2d 164, 166 (5th Cir. 1992) (administrative claim not presented where claimant failed timely to allege date and location of alleged wrong-doing and the names of the persons involved);

compare Santiago-Ramirez v. Department of Defense, 984 F.2d 16, 20 (1st Cir. 1993) (claim presented where letter started the date of the incident, the location of the incident, the government agents involved and the type of injury alleged).

4. 42 U.S.C. § 1985

Finally, defendants urge, and the Court agrees, that plaintiff's claim XXXVI,[24] 21 in which he alleges discrimination under 42 U.S.C. § 1985, is equally unavailing. Subsection (3) requires that the plaintiff prove that there was a conspiracy to deprive him of the equal protection of the laws. See 42 U.S.C. § 1985(3). Complaints brought under this provision must contain facts that would support an allegation of some type of "class-based, invidiously discriminatory animus behind the conspirators' action." Griffen v. Breckenridge, 403 U.S. 88, 102 (1971); see also Dacey v. Dorsey, 568 F.2d 275, 277 (2d Cir. 1978). Although plaintiff repeats the statutory language in his complaint, he fails to include any facts that would lend support to either the existence of a conspiracy, or any type of class-based discriminatory animus behind such conspiratorial action.

5. RICO

Plaintiff's attempts to invoke the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.

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[24] Claim XXXVI: "The Plaintiff was harmed by the aforementioned Defendants who illegally participated in a government-centered, class-based, invidiously discriminatory animus actionable under 42 U.S.C.A. § 1985(3)."

are without merit, because the statute is inapplicable to the present case. Properly understood, the statute requires factual allegation suggesting that defendants were participants in the operation of a enterprise, or the acquisition of control of an enterprise through a pattern of racketeering, as reflected in the repeated commission of predicate acts enumerated in the statute.[25] see generally Moss v. Morgan Stanley Inc., 719 F.2d 5, 17-18, 21-22 (2d Cir. 1983) Plaintiff has not alleged any facts relating to the commission of such predicate acts, and thus has failed to provide support for the application of the statute to this case.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion to amend the complaint is denied, and defendants' motion to dismiss the third amended complaint is granted. Plaintiff's complaint is hereby dismissed, in its entirety, as to all defendants with prejudice. Accordingly, the Clerk of the Court is directed to enter judgment in favor of defendants.

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[25] To state a claim under the statute, plaintiff must "allege the existence of seven constituent elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce." 18 U.S.C. § 1962 (a)-(c) (1976).

signed
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
November 20, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CALVIN SHOEMAKER,
Plaintiff,

-against-

UNITED STATES; SIX UNKNOWN FEDERAL DOES; CENTRAL INTELLIGENCE AGENCY; UNITED STATES SECRET SERVICE; DEPARTMENT OF DEFENSE; VETERANS ADMINISTRATION; NATIONAL SECURITY AGENCY; DOES 1-20; together and individually are

Defendants. x

AMENDED COMPLAINT
JURY TRIAL DEMANDED
{S.A.S.} 96 Cv. 1465

The Plaintiff, complaining of these Defendants files this action specifically pursuant to Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, Title 28 U.S.C.A. §1346(b) and §§ 2671 et. seq. alleges:

I. The Plaintiff's rights to privacy, First, Fourth, Fifth, Eighth, Ninth, and/or Fourteenth Amendment rights were violated by the Defendants because of their malicious, egregious, seriously negligent, tortious and/or intentional behavior directed at, about or against the Plaintiff.

II. On May 8, 1995, at approximately 4:25 p.m., the Defendants violated the Plaintiff's legal right to privacy, First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights by acting/conspiring with a television network, technically, illegally using electronic devices to gather information about and against the Plaintiff in the privacy of his own dwelling and then publishing said information, a violation of New York Penal Law § 250.05 relating to eavesdropping, a class E felony.

III. On May 15, 1995, at approximately 12:10 p.m., the Defendants violated the Plaintiff's legal right to privacy, First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights by acting/conspiring with a television network, using electronic devices to gather information about and against the Plaintiff in the privacy of his own dwelling and then publishing said information, a violation of New York Penal Law § 250.05 relating to eavesdropping, a class E felony.

IV. On May 16, 1995, in the evening, the Defendants violated the Plaintiff's legal right to privacy, First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights by acting/conspiring with a television network, using electronic devices to gather information about and against the Plaintiff in the privacy of his own dwelling and then publishing said information, a violation of New York Penal Law § 250.05 relating to eavesdropping, a class E felony.

V. On May 17, 1995, at approximately 7:15 p.m., the Defendants violated the Plaintiff's legal right to privacy, First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights by acting/conspiring with a television network, using electronic devices to gather information about and against the Plaintiff in the privacy of his own dwelling and then publishing said information, a violation of New York Penal Law § 250.05 relating to eavesdropping, a class E felony.

VI. On the evening of June 24, 1995, the said named Defendants violated the Plaintiff's legal right to privacy, First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights by acting/conspiring with a television network, using electronic devices to gather information about and against the Plaintiff in the privacy of his own dwelling and then publishing said information, a violation of New York Penal Law § 250.05 relating to eavesdropping, a class E felony.

VII. On June 27, 1995, at approximately 5:40 a.m., the Defendants violated the Plaintiff's legal right to privacy, First,

Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights by acting/conspiring with a television network, using electronic devices to gather information about and against the Plaintiff in the privacy of his own dwelling and then publishing said information, a violation of New York Penal Law § 250.05 relating to eavesdropping, a class E felony.

VIII. On September 6, at approximately 3:30 p.m., the Defendants violated the Plaintiff's legal right to privacy, First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights by acting/conspiring with a television network, using electronic devices to gather information about and against the Plaintiff in the privacy of his own dwelling and then publishing said information, a violation of New York Penal Law § 250.05 relating to eavesdropping, a class E felony.

IX. The Defendants in effect clothed the television networks with official power to continue their harmful behavior as agents acting under the authority of the government because the Defendants knew there was a conspiracy to harm the Plaintiff and they did not stop it, thus violating the Plaintiff's Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights, and civil liberties.

X. The Plaintiff suffered mental anguish and emotional distress because the Defendants stalked, harassed, intentionally inflicted emotional distress, defamed, intruded into the Plaintiff's private solitude, and cast aspersions about Plaintiff's social, racial, political, economic, religious

[2]

and sexual views, tendencies and/or prejudices in violation of the Plaintiff's Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights, and civil liberties.

XI. The Plaintiff has been harmed and suffered because of a massive conspiracy on behalf of the Defendants to judge/punish the Plaintiff without due process of law, thus constituting cruel and unusual punishment in violation of the Plaintiff's Fifth, and/or Eighth Amendment rights.

XII. The Plaintiff suffered damages because the Defendants violated the Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment liberties and civil rights by deliberately deciding and determining to launch a series of intimidating, maligning and tortious actions against the Plaintiff.

XIII. The Defendants violated the Plaintiff's Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights, and civil liberties by conducting a continuing investigation of the Plaintiff in a manner which severely violated the Plaintiff's rights, and right to privacy, subjected the Plaintiff to undue harassment and intimidation, and intruded into the Plaintiff's seclusion, private affairs and solitude.

XIV. That said continuing investigation, harassment and intimidation included obtaining confidential medical and dental records of the Plaintiff, and, pursuant to Article 45 § 4504 of the NY Civil Practice Law and Rules relating to privileged confidential information, then illegally disseminating the information gathered therefrom, thus violating the Plaintiff's Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights, and civil liberties.

XV. That said continuing investigation, harassment and intimidation included false charges of child abuse or sexual harassment of a child stemming from an incident in Auburn, California, several years ago in which the Plaintiff was falsely charged, yet the government and the media continued to use that information against the Plaintiff publicly thus violating the Plaintiff's Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights, and civil liberties.

XVI. The preceding examples only point out a few of the many incidents of unlawful, malicious, egregious, seriously negligent, and tortious behavior directed at, about or against the Plaintiff, thus contributing to a series of wrongs and injuries against the Plaintiff developing over the years in a conspiracy to seriously injure the Plaintiff.

XVII. The Plaintiff's Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment rights, and civil liberties were violated by the Defendants who engaged in obtrusive surveillance of the Plaintiff to such an extreme degree and by unreasonable means for an unreasonable length of time, thus constituting outrageous and malicious behavior by using of wiretapping devices, and by the use of electronics used for eavesdropping without the Plaintiff's consent, violations of NY Penal Law § 250.05 relating to eavesdropping, a class E felony.

XVIII. The Plaintiff was injured and suffered, to wit, because the Defendants failed to properly train U.S. law enforcement officials, giving Plaintiff legal grounds for a cause of action under 42 U.S.C.A. § 1983.

[3]

XIX. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by the Defendants after the Defendants determined that the Plaintiff has unusual assets, intellectual property, or a special expertise--secret scientific material, technically--considered to be of great worth for which the Defendants did not want to pay a fair price thus resulting in an illegally calculated scheme to steal said secret scientific material from the Plaintiff, a violation of New York Penal Law § 155.42 relating to grand larceny in the first degree, a class B felony.

XX. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by the Defendants after the Defendants determined that the Plaintiff has unusual assets, intellectual property, or a special expertise--secret scientific material, technically--considered to be of great worth for which the Defendants did not want to pay a fair price, thus resulting in a calculated scheme to charge the Plaintiff without due process of law, then punish the Plaintiff or "fine" him without due process of law.

XXI. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were

violated by the Defendants after the Defendants determined that the Plaintiff has secret scientific material considered to be of high worth for which the aforementioned Defendants did not want to pay a fair market price, thus resulting extortion, or in a calculated and illegal motus operandi or scheme to deprive the Plaintiff of the ability to financially capitalize on said secret scientific material, a violation of NY Penal Law § 155.05 relating larceny.

XXII. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by the aforementioned Defendants after the Defendants determined that the Plaintiff has unusual assets, intellectual property, or a special expertise considered to be of great worth for which the Defendants did not want to pay a fair market price, resulting in a calculated scheme to punish the Plaintiff without due process of law, illegally cause him to "serve time" or render his services, assets, talents, or intellectual properties to the public at a cheap cost, a calculated and illegal form of punishment or peonage which is outlawed.

XXIII. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by groups/members of the United States military after discovering that the Plaintiff's secret scientific material might have significant technical military importance for America, thus resulting in illegal schemes to stop the Plaintiff's successful departure from the U.S. for financial success elsewhere.

XXIV. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by groups/members of the United States and the military because about nine years ago the Plaintiff had worked for the government on special projects and "blew a whistle" on a megamillion dollar weapons system procured for the United States Army, thereby specifically exposing hundreds of millions of dollars of fraud, waste, abuse and mismanagement; that embarrassed the government/wealthy prime contractors for which they sought

retribution against the Plaintiff resulting in some of the outlandish behavior and subsequent

[4]

claims within the Complaint, thus violating 18 U.S.C.A. § 1513 relating to retaliation of an informant.

XXV. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by the Defendants in an effort to isolate the Plaintiff, deliberately forcing the Plaintiff to become withdrawn from society as a result of the abuse from the Defendants, whereafter the Defendants did fraudulently claim that the Plaintiff was forced into loaning some intellectual property, special expertise, or asset to the general public/Defendants, a violation of NY Penal Law § 155.05 relating larceny.

XXVI. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated when the Plaintiff decided that a political asylum application at the U.N. would be in the Plaintiff's best interests because of the oppression and abuse that the Plaintiff was unjustly suffering from, whereafter the Defendants determined that such a move by the Plaintiff to another country might result in an intelligence coup by some other military, or maybe a power gain by an enemy of the United States resulting in an illegal scheme to stop the Plaintiff.

XXVII. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by the aforementioned Defendants in attempts to further smear the Plaintiff with public statements and innuendoes to the public questioning the Plaintiff's patriotism, calling the Plaintiff foreign, soviet, or the enemy; fraudulent claims which thus caused great distress and extreme mental anguish in the Plaintiff.

XXVIII. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by the Defendant the United States Secret Service in

attempts to get control over the Plaintiff's expertise, intellectual property, or unusual assets--secret scientific material--believing the Plaintiff to be a dangerous political threat.

XXIX. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated, and the Plaintiff suffered mental anguish and emotional distress because he was harassed by medical personnel who illegally followed the Plaintiff, blatantly invaded the Plaintiff's privacy and then illegally performed medical tests, violating New York Public Health Law Article 28 § 2805-d relating to lack of informed consent.

XXX. The Plaintiff was severely harmed by Veterans Administration {VA} personnel who illegally released the Plaintiff's confidential medical history to the public, a violation of New York CPLR Article 45 § 4504 relating to privileged, confidential information, thus violating the Plaintiff's Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights.

XXXI. The Plaintiff was harmed by VA personnel who improperly and illegally released confidential medical history about the Plaintiff to the public, a violation of New York CPLR Article 45 § 4504 relating to privileged confidential information, further releasing inaccurate medical data to the general public; violations of the Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights.

[5]

XXXII. The Plaintiff was injured by the Defendants whom, in attempts to humiliate or damage the Plaintiff, engaged in collecting sewage/feces, whereafter the Defendants did humiliate and publicly ridicule the Plaintiff on national television by broadcasting their analyses of what they thought was waste matter from the Plaintiff; despicable acts of malice occurred not once or twice, but many, many times, thus violating the Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil rights, liberties and freedoms.

XXXIII. Upon catching the aforementioned Defendants in the act of collecting sewage and feces, the Defendants claimed that medical purposes gave them the motive and impetus to act in such a terrible manner when, in fact, the Plaintiff never gave his consent for any treatment for any ailment that might have been claimed by the Defendants in acting in such a despicable manner; said claims against the Defendants are violations of New York Public Health Law Article 28 § 2805-d relating to lack of informed consent, and the Plaintiff suffered as a result.

XXXIV. The Plaintiff was injured by the aforementioned Defendants who thought they could embarrass, humiliate or punish the Plaintiff by attaching a psychological stigma on the Plaintiff, further injuring the Plaintiff by public statements that the Plaintiff was suffering from multiple personalities, a diabolical way to try to gain control over the Plaintiff, in violation of the Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights.

XXXV. The Plaintiff was injured by the Defendants who laughed publicly at the Plaintiff, further deriving great joy from the Plaintiff's distress, ridicule and public humiliation, in violation of the Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights.

XXXVI. The Plaintiff was harmed by the aforementioned Defendants who illegally participated in a government-centered, class-based, invidiously discriminatory animus actionable under 42 U.S.C.A. § 1985(3).

XXXVII. The Plaintiff has clearly established constitutional rights and civil liberties; rights entitling him, as an American citizen, to be free from the malicious behavior enumerated in this Complaint--the infringement of his liberty interests are in violation of the protections afforded by the Due Process Clause of the Fifth Amendment. The Plaintiff has the clearly acknowledged constitutional right to engage in any of the common occupations of life, and further to enjoy those privileges

long recognized as essential to the orderly pursuit of happiness by free men, rights and liberties violated by the aforementioned Defendants.

XXXVIII. The Defendants are members of a nationwide, perhaps worldwide, conspiracy to violate the Plaintiff's rights, take control of the Plaintiff's assets, and defraud the Plaintiff, the public, and the world through an enterprise engaged in a pattern of organized racketeering activity, including blackmail and extortion, in violation of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of Title 18 U.S.C.A. § 1961 et. seq., thus violating the Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil rights.

[6]

XXXIX. The aforementioned Defendants are members of a nationwide, perhaps worldwide, conspiracy to violate the Plaintiff's rights, take control of the Plaintiff's assets, and defraud the Plaintiff, the public, and the world through an enterprise engaged in a pattern of organized racketeering activity, in violation of the RICO chapter of the Organized Crime Control Act of 1970, Title 18 U.S.C.A. § 1962(a), (b), (c), and (d).

XXXX. The Plaintiff further alleges that the Defendants used actual force, violence, or fear, or conspired to use threatened or actual force, violence, or fear to induce other persons, businesses, or nations to comply with the activities of the conspiracy; that the conspiracy/racketeering activity included blackmail, and extortion under the Hobbs Act, in violation of the RICO chapter of the Organized Crime Control Act of 1970, Title 18 U.S.C.A. § 1961 et. seq., which injured the Plaintiff's business and property interests; that such alleged unlawful activities affected national, interstate and/or foreign commerce; and that said activities were directed toward an economic or other identifiable goal.

XXXXI. The Plaintiff's First, Fourth, Fifth, Eighth, Ninth and/or Fourteenth Amendment civil liberties and rights were violated by the aforementioned Defendants, pursuant to 15 U.S.C.A. § 1692, after the Plaintiff was given an extension of credit

unenforceable through civil judicial technical processes against the debtor; the total of the extensions of credit by the creditor to the Plaintiff outstanding, including any unpaid interest or similar charges, exceeds $100; that the Plaintiff was unaware that nonrepayment would be punished by extortionate means; that a conspiracy between the Defendants, the media, and the creditor ensued against the Plaintiff involving involuntary conversion of property, or a conspiracy to involuntarily convert property, extortion, blackmail and/or the punishment of the Plaintiff through the use of the press/media; and that these claims against the Defendants violate title 18 U.S.C.A. § 891 et. seq., extortionate credit transactions.

XXXXII. The Defendants devised or intended to devise schemes or artifices to defraud, for obtaining money or property by means of false or fraudulent pretenses, representations, or promises; or intended to sell, dispose of, loan, exchange, alter, give away, distribute, supply, furnish or procure for unlawful use the Plaintiff's obligations, securities, or other articles of the Plaintiff's possession; or to fraudulently cause an inability of the Plaintiff to financially capitalize on his properties; or through extortion, or contemplated extortion; placed or caused to be placed in the U.S. Postal system items to be delivered specifically to the Plaintiff's authorized depository for mail at 163 Amsterdam Avenue, New York City, in violation of 18 U.S.C.A. § 1341 relating to mail fraud.

XXXXIII. As a direct result of the Defendant's cruel, intentional and/or negligent actions the Plaintiff suffered an inability to financially capitalize on properties and/or intellectual properties; the oppression by the Defendants of the Plaintiff caused the Plaintiff financial hardship resulting in the Plaintiff's financial inability to seek needed medical care, further resulting in unnecessary pain and suffering, mental anguish, emotional distress, contempt, anxiety of mind, humiliation, and public ridicule.

[7]

The Plaintiff demands judgment:

First: That the Defendants, and any government official or branch connected with wrongful actions towards the Plaintiff, be forever and permanently enjoined and restrained from any type of intrusive behavior that might be a violation of the Plaintiff's constitutionally protected rights and liberties.

Second: The Plaintiff prays for damages against the aforementioned Defendants and judgment for the Plaintiff, specifically including, but not limited to, punitive, compensatory, declaratory and special damages of $99,000,000.00 each plus the costs and disbursements plus any further relief the court sees fit.
//

Dated: New York, NY
Sep. 23, 1996

signed

Calvin L. Shoemaker, Plaintiff, In *Pro Se*
163 Amsterdam Ave., Suite 7777
New York, New York 10023
telephone 917.912.4868

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CALVIN SHOEMAKER,
Plaintiff,

-against-

UNITED STATES; et al.,
Defendants

AFFIRMATION IN SUPPORT
OF OPPOSITION TO DISMISS
{S.A.S.} 96 Cv. 1465

x

STATE OF NEW YORK }
COUNTY OF NEW YORK}

Calvin L. Shoemaker, Plaintiff. In Pro Se, makes this affirmation under the penalty of perjury: I'm Calvin L. Shoemaker, the Plaintiff in the above entitled action. I am now courteously asking the Court deny the motion to dismiss my Complaint. Further, I am now making these supporting declarations of opposition to dismiss my amended Complaint, the motion to compel, and my motion to amend my Complaint:

1. The Plaintiff points out the U. S. Attorney has failed the Court's rule for pre-motion conference letter to the Court.

2. Attached hereto as Exhibit A is the first letter with my call for damages sum certain against the U. S. to the Dept. of Justice {DOJ}, dated 4.5.95.

3. Attached hereto as Exhibit B is the first letter with my call for damages sum certain against the U.S. Veterans Administration, and Lee Brown, in his official capacity.

4. Attached hereto as Exhibit C is the first letter from the U.S. Veterans Administration answering my claim or damages sum certain, dated June 7, 1995.

5. Attached hereto as Exhibit D is the second letter to the DOJ with my call for damages sum certain dated July 27, 1995.

[1]

6. Attached hereto as Exhibit E is the second letter from the DOJ answering my call for damages sum certain, dated August 15, 1995.

7. Attached hereto as Exhibit F is the first letter from the DOJ answering my call specifically for damages sum certain. This letter, dated April 26, 1995 was not sent to me until I actually opened the letter in Exhibit E.

8. Attached hereto as Exhibit G is the letter charging the Director of the FBI, the Attorney General, the FBI, and DEA, dated September 1, 1995.

9. Attached hereto as Exhibit H is my final letter to the DOJ, dated October 6, 1995.

10. Attached hereto as Exhibit I is my pre-motion conference letter, per the Court's rules specifically indicating the Court's aptness to freely grant leave, for an order for leave to amend the Complaint.

11. Attached hereto as Exhibit J per the Court's rules, the Plaintiff's RICO Statement which outlines charges against the Defendants. Sufficient information exists for DOJ to launch an investigation into the charges. I want the data applicable to my Complaint.

12. Attached hereto as Exhibit K is Fed. R. Civ. P. Rule 26.

13. Over two months ago, the U.S. Attorney and the Plaintiff went before your Honor who graciously gave the United States sixty extra days to comply with discovery. Now, technically, they failed your instruction. Pursuant to Rule 14 of the Civil Justice Expense and Delay Reduction Plan, sanctions might be justified, at your Honor's discretion.

14. The FTCA is moot because it isn't the Plaintiff's exclusive remedy in this action, per title 28 U.S.C.A. § 2679 attached to this affirmation as Exhibit L.

[2]

Because of these factors and in the interests of jurisprudence, the motion within should be granted by this honorable Court, in addition to any further relief this honorable Court would deem proper.

I, Calvin L. Shoemaker, declare under penalty of perjury that the former is true.

Dated: New York, NY
Sept. 16, 1996 *signed*

Calvin L. Shoemaker, Plaintiff, In Pro Se
163 Amsterdam Ave., Suite 7777
New York, New York 10023
917.912.4868

Calvin L. Shoemaker
7 Broadway, Suite 21
New York, NY 10004

4.5.95

Honorable Janet Reno
Attorney General of the US
Department of Justice
Tenth and Constitution Avenue NW
Room 4400
Washington, DC 20530

Madam Attorney General:

A Complaint and demand for damages sum certain was sent several months ago. See enclosure. Further, a Complaint and demand for damages sum certain was sent to the Veterans Administration which should have been forwarded to you. See enclosure.

The facts are Madam Attorney General, that I have incurred damages because of US government wrongful actions. Ignoring my letters shall not solve these Complaints.

Specifically, it is my purpose to come to a settlement, as said in the letters, without filing an action in Court. But, Court action shall be the result if we cannot settle these issues. Please be reasonable; address the issues and write me detailing the actions.

With admiration,

[signed]
Calvin L. Shoemaker

Enclosures

[seal] DEPARTMENT OF VETERANS AFFAIRS
Medical Center
423 East 23rd Street
New York NY 10010

In Reply Refer To: 630/004

June 7, 1995

Calvin L. Shoemaker
163 Amsterdam Avenue
Suite 21
New York, NY 10023

Dear Mr. Shoemaker:

I would appreciate your calling me regarding recent correspondence received by the Department of Veterans Affairs in Washington, DC. I can be reached at (212) 86-7500, extension 4048 between the hours of 8:30AM and 5:00PM.

I look forward to speaking with you in the near future.

Sincerely,

[signed]
ELEANOR LOBELL
Patient Representative

Calvin L. Shoemaker
163 Amsterdam Ave., Suite 21
New York, NY 10023
917 986 5883 pager

July 27, 1995

Honorable Janet Reno
Attorney General of the US
Department of Justice
Tenth and Constitution Avenue NW
Room 4400
Washington, DC 20530

In the Matter of: Complaints against US

Madam Attorney General:

A Complaint and demand for damages sum certain was sent several months ago. See enclosure. Further, a Complaint and demand for damages sum certain was sent to the Veterans Administration which should have been forwarded to you. See enclosure.

The facts are Madam Attorney General, that I have incurred damages because of US government wrongful actions. Ignoring my letters shall not solve these Complaints.

Specifically, it is my purpose to come to a settlement, as said in the letters, without filing an action in Court. But, Court action shall be the result if we cannot settle these issues. Please be reasonable; address the issues and write me detailing the actions.

With admiration,

[signed]
Calvin L. Shoemaker

Enclosures

[seal]

U.S. DEPARTMENT OF JUSTICE
Civil division, Torts Branch
Federal Tort Claims Act Staff

Veronica L. Long
Paralegal Specialists

Pst Office Box 888
Benjamin Franklin Station

Telephone: (202) 616-4265
Facsimile: (202) 616-5200

JA:VLLong : m
157-51-0

August 15, 1995

Calvin L. Shoemaker
163 Amsterdam Avenue
Suite 21
New York, NY 10023

Re: Administrative tort claim of Calvin L. Shoemaker

Dear Mr. Shoemaker:

Your letter dated July 27, 1995, addressed to Janet Reno, Attorney General of the United States, has been referred to me for a response. The Department of Justice received your letter on July 31, 1995.

In your July 27, 1995 letter, you state that you received no response from the Department of Justice regarding a clam you presented to the Department of Justice on April 5, 1995,a copy of my letter, dated and mailed to you on April 26, 1995, responding to your April 5, 1995 letter, is enclosed.

While we sympathize with your situation, the authority of the U.S. Department of Justice is limited by statute to giving legal advice and rendering other legal services to the President and heads of the Executive Departments, and not to private citizens such as yourself.

I suggest that you direct future correspondence regarding your claim to the Department of Veterans Affairs, Medical Center, 423 East 23rd Street, New York, New York 10010, Attention: Eleanor Lobell, or call Ms. Lobell at (212) 686-7500, extension 4048, between the hours of 8:30 a.m. and 5:00 p.m., as requested in her letter of June 7, 1995, to you, a copy of which is also enclosed.

Very truly yours,

[signed]
Veronica L. Long
Paralegal, Torts Branch
Civil Division

Enclosures

cc: Mr. E. Douglas Bradshaw
(mail code 021)
Acting Assistant General Counsel
Department of Veterans Affairs
810 Vermont Avenue. N.W.
Washington, D.C. 20420

Ms. Eleanor Lobell
Patient Representative
Department of Veterans Affairs
Medical Center
423 East 23rd Street
New York, New York 10010

[seal] U.S. DEPARTMENT OF JUSTICE
Civil division, Torts Branch
Federal Tort Claims Act Staff

Veronica L. Long
Paralegal Specialists

Pst Office Box 888
Benjamin Franklin Station

Telephone: (202) 616-4265
Facsimile: (202) 616-5200

JA:VLLong : m
157-32-0

April 26, 1995

Calvin L. Shoemaker
163 Amsterdam Avenue
Suite 21
New York, NY 10023

Re: Administrative tort claim of Calvin L. Shoemaker

Dear Mr. Shoemaker:

The administrative tort claim you presented to the Attorney General Janet Reno, has been referred to me for a response. Your claim was received on April 7, 1995.

After reading your claim, I am unable to determine how the U.S. Department of Justice is involved in this matter. If you wish to present a claim under the Federal Tort Claims Act, your claim must conform in all respects with Statutes, Title 28, United States Code §§ 2671-2680. You should provide specific information establishing the liability of the United States, including the identity of the federal agency and employee responsible for this incident which caused the injuries. The claim should be forwarded to the appropriate federal agency responsible for your injuries.

Your claim is returned herewith.

Very truly yours,
[signed]
Veronica L. Long
Paralegal, Torts Branch
Civil Division

Calvin L. Shoemaker
163 Amsterdam Ave., Suite 21
New York, NY 10023
917 986 5883 pager

July 27, 1995

Veronica L. Long
U.S. Department of Justice
Civil Division Torts Branch
Federal Tort Claims Act Branch
Post office Box 888
Franklin Station
Washington, DC 20044

About: **Complaint and Claim for Damages Sum Certain of $850,000,000.00**

Ms Veronica L. Long,

After studying your letters and contemplating the appropriate course of action, want to attempt once again at finalizing this action. You say that you can't determine how the US Department of Justice is involved in the matter. I find that hard to believe, but I can simplify.

The Attorney General of the Justice Department is involved. Additionally, the Director of the FBI is involved. Both individuals and others below them have been connected to or bear responsibility for tortious, wrongful and/or negligent actions, however my Complaint in this action is not limited to these two people. My rights as a United States citizen have been violated including my right to be free from abusive government conduct on behalf of the FBI/DEA public agencies of the Justice Department. Further, the Justice Department failed/is at fault because it allowed abusive government conduct/misconduct to continue constituting negligence among other charges. The Complaint details the tortious, wrongful and/or negligent behavior/misconduct.

Your latest letter states that the US Department of Justice is limited by statute to giving legal advice to the president and heads of the executive departments, and not to citizens. That statement is not true. The US Department of Justice is not limited by statute to giving such legal advice. Pursuant to Title 28 of the U.S.C.A. §2672 "[t]he head of each Federal agency or his designee . . . may consider, ascertain, adjust, determine, compromise, and settle and [C]laim for money damages against the United States . . . ." Further, "[e]ach Federal agency may use arbitration, or other alternative means of dispute resolution under provisions of subchapter IV of chapter 5 of title 5, to settle any tort [C]laim against the United States . . . ." Didn't you mention that code in your letter? Aren't these your functions?

It is my opinion and distinct impression at this point in time that cover ups exist within the Justice Department which is falling short of its duty/showing me the runaround. I feel that he latter opinion more closely sums it up.

Let's get with the program, Ms. Veronica Long. I want to help formulate a compromise, but youll need to drop the ignorance act and start to communicate.

Admiration,

[signed]
Calvin L. Shoemaker

Enclosures
cc Attorney General
FBI Director

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND FEDERAL RULES

42 U.S.C.A. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C.A. § 1985(3)

"Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

28 U.S.C.A. § 2671:

"Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States. "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty."

28 U.S.C.A. § 2672:

"Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the

head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee. Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all offices of the Government, except when procured by means of fraud. Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter. The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter."

28 U.S.C.A. § 2673:

"Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim."

28 U.S.C.A. § 2674:

"Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled. With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter."

28 U.S.C.A. § 2675:

"Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed

shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time or presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages."

28 U.S.C.A. § 2676:

"Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

28 U.S.C.A. § 2677:

"Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon."

28 U.S.C.A. § 2678:

"Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if

recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both."

28 U.S.C.A. § 2679:

"Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government -

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies

of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney

General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if -

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

The **First Amendment** provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a re dress of grievances."

The **Fourth Amendment** provides as follows:

"The right of the people to be secure in their persons, houses, papers, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The **Fifth Amendment** provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of l aw; nor shall private property be taken for public use, without just compensation."

The **Eighth Amendment** provides as follows:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The **Ninth Amendment** provides as follows:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The **Fourteenth Amendment** provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws."

Fed. R. Civ. P. Rule 6(b) states as follows:

"Time

(b) Enlargement.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period

enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

Fed. R. Civ. P. Rule 6(e) states as follows:
"Time
(e) Additional Time After Service by Mail.
Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period."

Fed. R. Civ. P. Rule 8(a) states as follows:
"**Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded."

Fed. R. Civ. P. Rule 8(e)(1) provides as follows:
"**Pleadings to be Concise and Direct; Consistency.** (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

Fed. R. Civ. P. Rule 12(b)(6) states as follows:
"failure to state a claim upon which relief can be granted".

Fed. R. Civ. P. Rule 15(a) states as follows:

"Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave

shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

Fed. R. Civ. P. Rule 26(a) states as follows:

"General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties: (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information; (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings; (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for

payments made to satisfy the judgment. Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures."

Fed. R. Civ. P. Rule 54(b)
"**Judgments; Costs**
(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Fed. R. Civ. P. Rule 55(a) states as follows:
"**Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."

Fed. R. Civ. P. Rule 55(b)(1) states as follows:
"**Judgment.** Judgment by default may be entered as follows:
(1) **By the Clerk**. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made

certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has defaulted for failure to appear and is not an infant or an incompetent person."

Fed. R. Civ. P. Rule 55(c) states as follows:
"**(c) Setting Aside Default.** For good cause shown the court may set aside an entry of default and, if judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Fed. R. Civ. P. Rule 56(a) states as follows:
"**For Claimant**. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for summary judgment in the party's favor upon all or any part thereof."

Fed. R. Civ. P. Rule 56(c) states as follows:
"**Motions and Proceedings Thereon**. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Fed. R. Civ. P. Rule 56(e) states as follows:
"**Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit thereto shall be

served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is no genuine issue for trial. If the adverse part does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

Civil Rule 3(g) states as follows:

"Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement constitutes grounds for denial of the motion. The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

Civil Rule 10 states as follows:

"When a party is entitled to have the clerk enter a default judgment pursuant to Rule 55(b)(1), Federal Rules of Civil Procedure, said party shall submit with the form of judgment a statement showing the principal amount due which shall not exceed the amount demanded in the complaint, given credit for any payments and showing the amounts and dates thereof, a computation of the interest to the day of judgment, and the costs and the taxable disbursements claimed. An affidavit of the party or said party's attorney shall be appended to the statement showing: (1) that the party against whom judgment is sought is not an infant or an incompetent person; (2) that the party has made default in appearance in the action; (3) that the amount shown in the statement is justly due and owing and that no part has been paid except as

therein set forth, an (4) that the disbursements sought to be taxed have been made in the action or will necessary be made or incurred therein. The clerk shall thereupon enter judgment for principal, interest and cost."

New York Penal Code § 250.05

"A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication. Eavesdropping is a class E felony."

Supreme Court, U.S.
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IN THE

Supreme Court

of the

United States

OCTOBER TERM, 1997

CALVIN L. SHOEMAKER,
Plaintiff-Petitioner,

v.

UNITED STATES, SIX UNKNOWN FEDERAL DOES, UNITED STATES JUSTICE DEPARTMENT, CENTRAL INTELLIGENCE AGENCY, UNITED STATES SECRET SERVICE, DEPARTMENT OF DEFENSE, VETERANS ADMINISTRATION, NATIONAL SECURITY AGENCY; DOES 1-20;
Defendants-Respondants.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

SUPPLEMENTAL APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

Calvin L. Shoemaker, *Plaintiff, pro se*
342 West 71st St., #3S8
New York, NY 10023
917.912.4868

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APPENDIX

DC: SDNY
DC Docket: 96-cv-1465
DC Judge: SCHEINDLIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifth day of February, one thousand nine hundred ninety-eight.

Present: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE GUIDO CALABRESI,
Circuit Judges,
HONORABLE RICHARD OWEN,
District Judge.

CALVIN L. SHOEMAKER
Plaintiff-Appellant,

-v- No. 9706073

U.S. DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION; DRUG ENFORCEMENT AGENCY; PRESIDENT OF THE UNITED STATES OF AMERICA; VICE PRESIDENT OF THE UNITED STATES; NATIONAL SECURITY AGENCY; SIX UNKNOWN FEDERAL DOES,

Defendants-Appellees.

FOR APPELLANT: Calvin Shoemaker, Pro Se, New York, NY

FOR APPELLEES: Kathleen M. Riedy, Steven M. Haber, Assistant United States Attorneys, New York, NY

[1]

Shoemaker v. U.S. Dep't of Justice, No. 97-6073

Appeal from the United States District Court for the Southern District of New York (Scheindlin, Judge).

This cause came on to be heard on the transcipt of record from the United States District Court for the Southen District of New York and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the appeal be and t is hereby DISMISSED.

Calvin Shoemaker alleges that the government is spying on him. Specifically, he believes that the government, in league with the major television networks, is reading his mind, searching his computer records, and stealing his bathroom waste. Shoemaker claims that in attempts to embarrass him, the govemnent and the networks have: (1) broadcast information about his feces on national television; and (2) filed and publicized fals charges of child abuse against him.

In February 1996, Shoemaker filed suit in the United States District Court for the Southern District of New York (Scheindlin, J.) alleging that various agencies and officials of the federal government violated: 42 U.S.C. §§ 1983 & 1985; the Tucker Act, 28 U.S.C. § 1346; the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961; and various New York State laws, by defaming him and subjecting him to constant

surveillance. Shoemaker sought damages of $850 million and an injunction prohibiting further surveillance.

Shoemaker filed a similar lawsuit one year earlier, which was dismissed as "frivolous and delusional." Shoemaker v. State of California, No. 95 Civ. 2945 (S.D.N.Y. Sept. 12, 1995) (Preska, J.). This court affirmed that dismissal by summary order, noting that Shoemaker's clams were conclusory and frivolous. Shoemaker v. State of California, No. 95-7964 (2d Cir. Mar. 8, 1996).

In the suit before us, Shoemaker amended his complaint twice. In September 1996, Shoemaker asked Judge Scheindlin for leave to amend a third time and for an order compelling discovery. Judge Scheindlin granted leave to amend. She also ordered the government to produce any files that it had on Shoemaker.

In December 1996, the government moved to dismiss Shoemaker's third amended complaint pursuant to Fed. R. Civ. P. 12 (b)(1), (5), & (6). The government argued that that: (1) the allegations in the complaint were so insubstantial that the district court lacked subject matter jurisdiction; (2) the claims against the United States were barred by sovereign immunity; (3) Shoemaker had failed to serve the defendants; (4) the complaint failed to state a claim upon which relief could be granted; and (5) the claims were barred by res judicata.

On March 5, 1997, Judge Scheindlin granted the motion to dismiss, essentially for the reasons advanced by the government. Judge Scheindlin also denied a fourth motion by

Shoemaker for leave to amend on the ground that amendment would be futile.

Shoemaker now appeals, arguing that: (1) Judge Scheindlin should have granted him a default judgment; (2) he properly served all the defendants; (3) he was accorded insufficient discovery and was provided fraudulent documents by the government; and (4) it was error to dismiss his claim.

This court has inherent authority to dismiss an appeal as frivolous when the appeal presents no arguably meritorious issue for consideration. See Pillay v. INS, 45 F.3d 14, 17 (2d Cir. 1995)

(per curiam). This authority is not limited to appeals brought in forma pauperis. See id.

A case is frivolous when it presents "clearly baseless" factual contentions. Neitzke v. Williams, 490 U.S. 319, 327 (1989); see Denton v. Hernandez, 504 U.S. 25, 33 (1992) (case is frivolous when factual allegations "rise to the level of the irrational or wholly incredible"). This standard applies even when the plaintiff has paid the filing fee. See Pillay, 45 F.3d at 17.

Shoemaker's factual allegations are irrational and incredible. Indeed, the claims he asserts in his suit are not materially different from the allegations that he made in his previous lawsuit. This court found that suit "frivolous on its face." Shoemaker, No. 95-7964 at * 1. Nothing makes the allegations in this case more plausible.

We have considered all the arguments raised by Shoemaker and find them to be without merit.

Accordingly, the appeal is DISMISSED.

For the Court,
George Lange, III, Clerk
by *signed*